

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

Case No. 09-52889

KAY BEE KAY PROPERTIES, LLC,

Chapter 11

Debtor.

Judge Thomas J. Tucker

**ORDER DENYING, WITHOUT PREJUDICE, THE FIRST INTERIM FEE
APPLICATION OF ATTORNEYS FOR DEBTOR-IN-POSSESSION**

This case is before the Court on an interim fee application filed by counsel for the Debtor-in-Possession, entitled "First Interim Application Of Counsel For Kay Bee Kay Properties, LLC, Debtor-in-Possession for the Period April 1, 2009 Through September 30, 2009 and For Keith Kramer, Debtor-in-Possession For the Period of January 1, 2009 Through September 30, 2009" (Docket # 128). The Applicant filed a Certification of No Response on November 18, 2009.

The Court cannot approve the fee application at this time, because the "Order Establishing Deadline and Procedures," filed on May 13, 2009 (Docket # 18), prohibits the filing of interim fee applications. It provides, in relevant part: "Unless the Court orders otherwise, each professional may file one and only one final fee application." (See "Order Establishing Deadline and Procedures" at 3 ¶ 7.)

Accordingly,

IT IS ORDERED that the "First Interim Application Of Counsel For Kay Bee Kay Properties, LLC, Debtor-in-Possession for the Period April 1, 2009 Through September 30, 2009 and For Keith Kramer, Debtor-in-Possession For the Period of January 1, 2009 Through September 30, 2009" (Docket # 128), is DENIED, without prejudice.

IT IS FURTHER ORDERED that if and to the extent the Court's Order approving Applicant's employment, filed May 22, 2009 (Docket # 27), approved the procedures requested in paragraph 6 of Applicant's employment application (Docket # 25), such approval is now vacated, effective immediately.¹

¹ It has come to the Court's attention, after reading footnote 2 of the fee application, that Debtor's counsel included the following provision in its employment application filed May 21, 2009 (Docket # 25 at ¶ 6):

The Debtors-in-Possession further request authority to compensate Steinberg Shapiro & Clark on a monthly basis, under the following terms: each month, Steinberg Shapiro & Clark shall provide the Debtor-in-Possession, the Office of the U.S. Trustee, and the Twenty Largest Unsecured Creditors or Unsecured Creditors' Committee with a detailed billing report indicating the fees and expenses incurred in connection with this matter. In the absence of any objections to the monthly statement raised within ten (10) days following submission of the fee statement, the Debtor-in-Possession seeks authority to disburse an amount equal to seventy-five (75%) percent of the fees and one hundred (100%) of the expenses requested in the statement. Each 120 days from the date of appointment, Steinberg Shapiro & Clark will be required to file an application for Court allowance of all paid and unpaid fees, and payment of the 25% holdbacks from the monthly statements. Monthly payments will be made from the retainer on hand unless and until exhausted, following which the Debtor(s) will remit payments from funds on hand."

Curiously, given the inclusion of this paragraph 6 in the employment application, the United States Trustee consented to the order approving the employment application, and such an order was entered on May 22, 2009. (Docket ## 26, 27). That order did not mention the above provision, but rather simply stated, in pertinent part, that "the employment of Steinberg Shapiro & Clark by the Debtor and Debtor-in-Possession as counsel is APPROVED."

It is debatable whether the May 22, 2009 Order, just quoted, approved the monthly fee-payment procedures proposed in paragraph 6 of the fee application. But if it did, it should not have, because Debtor's counsel should not have buried the monthly fee-payment request in its employment application. Such a request should be made by a separate, stand-alone motion, under L.B.R. 2016-3.

Signed on November 20, 2009

/s/ Thomas J. Tucker

**Thomas J. Tucker
United States Bankruptcy Judge**

In addition, if the May 22, 2009 Order did approve the procedures requested in paragraph 6 of the employment application, including the requirement for counsel to file a fee application every 120 days, that requirement was inconsistent with the Court's scheduling order, and the latter order prevails in this instance.